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Before the

FEDERAL COMMUNICATIONS COMMISSION

There is a split in the comments about how the Commission should interpret the statute. Cable operators argue that the low penetration cable systems must be included fully in the Commission's database and in its calculation of the benchmark rate, because low penetration cable systems are included within the definition of "effective competition" set out in § 623(l) of the statute.[3] Their arguments are, in effect, that the Commission somehow is bound by the statute to include these data fully in its benchmark calculations, and that it has no choice but to do so. The cable operators do not dispute that low penetration cable systems' rates are high and that these cable systems do not face competition in their service areas. Thus, the cable operators recognize that even though these cable systems may be included in the statutory definition, their rates are not subject to the forces of effective competition. They rely on what they view as an inflexible requirement in the law, even though they also recognize that the underlying result of that position was not contemplated by Congress.

In contrast, most other commenters evaluated the statute more carefully and recognized that, notwithstanding the inclusion of low penetration cable systems in the statutory definition of "effective competition", there is nothing that binds the Commission to accept that the rates charged by these systems are competitive rates

[3]See, e.g., Discovery Communications at 4; NCTA at 7; Time Warner at 4; Arizona Cable Television Association, et.al., (ACTA) at 3; Colony Communications et.al., at 4; Viacom at 2; CATA at 2; Continental Cablevision at 3; TCI at 4.

when it sets its rate regulation pricing benchmarks.[4] USTA agrees with the latter group of commenters.[5]

The cable operators have set up a faulty analytic framework. They take the statutory obligation of the Commission - to ensure that subscribers of any system not subject to effective competition will not face rates that are unreasonable - and argue that the rates of cable systems that are within the definition of "effective competition" must be deemed per se reasonable. This is a false alternative. These rates are anything but reasonable.

Of course, the facts show that any argument that rates of low penetration cable systems are reasonable is manifestly untrue. The rates of low penetration cable systems within the definition of "effective competition" may not be subject to rate regulation, but that does not mean their rates are competitive. The Commission's sample proves that these low penetration cable system rates are higher than the rates of other systems that cable operators know are subject to rate regulation. But for the fact that the low penetration cable systems are themselves statutorily exempt from rate regulation, they, too, would be subject to rate

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[4]NATOA at 2 (Commission may exclude, or give less weight to, rate data of low penetration systems); City of Alexandria at 5 (current benchmarks recapture only 1/6 of $6 billion overcharges); CFA at 2-8; Joint Comments of Bell Atlantic, GTE and NYNEX at 11-13; Counsel to Municipal Franchising Authorities at 3.

[5]See USTA comments at 2.

reductions because of rates that exceed the benchmark. As NATOA indicates, "(A)lthough Congress intended to exempt cable systems with penetration rates of less than 30 percent from rate regulation, it did not intend for such systems to be taken into account as competitive systems in determining reasonable rates for cable service."[6]

The Commission is not redefining "effective competition" in the FNPRM. It is using the data it has available to it to set benchmarks for reasonable rates.[7] It

cable systems from those charged by non-competitive systems, and to develop a set of benchmarks based on competitive system rates." (emphasis added)[8]

Two other comments are appropriate. First, Time Warner argues that the Commission's sample size is too small to be used to set rate benchmarks.[9] That argument is entitled to no consideration here, for a number of reasons. Congress knew when it passed the 1992 cable legislation that there was little competition in the cable industry. It knew, therefore, that any group of cable systems with competitive rates would be likely to be relatively small. It also determined, in the face of this knowledge that there was a dearth of systems with competitive rates, that the Commission should have a mandate to assess the reasonableness of cable rates. In giving the Commission the ability to establish benchmarks, then, Congress accepted the fact that the Commission had to do what it could with what was available.

The statute provided the Commission with some flexibility in assessing the reasonableness of rates, allowing it to consider various factors, but not prescribing an inflexible process. The Congress' framework for doing this suggests that the Commission was expected to use its agency expertise in balancing the values of different variables in its overall benchmarking equation. "Pure statistics" is not

[8]CATA Petition for Reconsideration in this proceeding, filed June 21, 1993, at 18.

[9]Time Warner at 13.

what Congress demanded. As Bell Atlantic, et.al., state, no part of the 1992 legislation "implies that the agency must check its critical faculties at the door."[10]

Also, the case cited by Time Warner is inapposite. That case was decided in a different context, where a court demanded a certain level of proof to justify significant antitrust liability. Here, the administrative process can accept the fact of inexact data and utilize available expertise in considering it, so as to serve the public interest. Actually, the Commission's sample universe was of an appropriate size.

The other comment USTA will make relates to services. A few of the cable operators argue that new program services would be restrained by exclusion of low penetration systems in the benchmark process,[11] or that the industry would be "devastated" by further rate changes.[12] The Commission should give little weight to these arguments. The further expansion of the cable industry is not one of the factors identified by Congress in new § 623(b)(2) or § 623(c)(2), and is not a subject of the FNPRM. That argument is simply "code" for seeking to continue to exact monopoly rents. The cable companies' election to enter covenants with

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[10]Bell Atlantic, et.al., at 11.

[11]Discovery at 5.

[12]ACTA, et.al., at 8-15.

financial institutions promising high cash flow in exchange for loans is not relevant to reasonable rates.[13]

There is no proof of such harm. Most cable systems share prices in public markets are at or near the levels that prevailed at the time of the Commission's Report and Order. The cable operators are "crying wolf" one more time.

The Commission should give no weight to the low penetration cable systems in setting its benchmarks for reasonable rates, and should act to cause the additional rate reductions required by the resulting downwardly-revised benchmarks.

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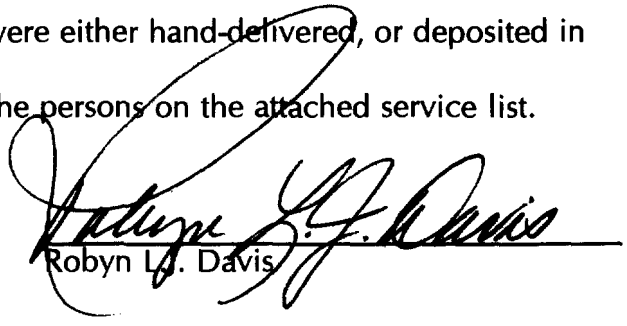
[13]See Letter of Bank of New York, et.al., sent June 21, 1993.

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on July 2, 1993 copies of the Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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